HU CHANG PEE

v.

TAN SRI DATUK PADUKA (DR) TING PEK KHIING

HIGH COURT SABAH AND SARAWAK, MIRI
HASAN LAH JC
[SUIT NO: 22-139-98 (MR)]
7 MAY 1999

CIVIL PROCEDURE: *Affidavits - Contents - Admission of debt in affidavit filed for particular suit - Whether may be used as basis for instituting different suit against deponent - Whether affidavit a privileged document - Evidence Act 1950, ss. 17 & 18*

CIVIL PROCEDURE: *Striking Out - Grounds for - Limitation - Whether claim may be struck out because time-barred - Tio Chee Hing v. Government of Sabah*

LIMITATION: *Acknowledgement of debt - Debt acknowledged after expiration of limitation period - Whether claim time-barred - Whether claim ought to be struck off - Limitation Ordinance (Cap. 49 of Sarawak), item 43 of schedule & s. 19*

EVIDENCE: *Admissions - Of debt - Admission in affidavit filed for particular suit - Whether may be used as basis for instituting different suit against deponent - Whether affidavit a privileged document - Evidence Act 1950, ss. 17 & 18*

CIVIL PROCEDURE: *Striking Out - Abuse of process of court - Multiplicity of actions - Action brought by plaintiff and action brought by plaintiff's incorporated company based on same subject matter - Whether amounts to multiplicity of actions - Whether plaintiff could have elected which action to pursue - Whether an abuse of process of court*

This was an application by the defendant to strike out the plaintiff's suit pursuant to O. 18 r. 19 of the Rules of the High Court 1980. The plaintiff filed a suit ('the present suit') against the defendant claiming for a refund of RM8.5 million which he alleged he paid to the defendant in reliance on a promise and representation given by the defendant that the defendant would procure to appoint the plaintiff as the main logging contractor for a timber concession area and in the event the defendant failed to do so, the defendant would refund the money. Before the present suit was filed, a different suit ('the other suit') was instituted by one Interhill Enterprise Sdn Bhd, the

plaintiff being the managing director of this company, against the defendant claiming for the same relief. In resisting the other suit, the defendant stated in an affidavit that the RM8.5 million was advanced by the plaintiff in his personal capacity and not by Interhill Enterprise Sdn Bhd. As a result of this affidavit, the plaintiff filed the present suit in his personal capacity. The defendant then filed this application to strike out the present suit on the following grounds: (i) that it was an abuse of the process of the court as there was multiplicity of actions since the same subject matter was relied upon in the present suit and the other suit; (ii) the plaintiff was not entitled to rely on documents obtained from the other suit as the basis of the present suit; and (iii) pursuant to item 43 of the schedule to the Limitation Ordinance (Cap. 49 of Sarawak), the action was time-barred as more than three years had passed since the money was paid to the defendant and furthermore, the acknowledgement of the receipt of the money by the defendant could not revive the limitation period since the acknowledgement itself was made after the plaintiff's claim was time-barred.

Held:

[1] The plaintiff has not abused the process of the court as the plaintiff in the present suit and the plaintiff in the other suit is not the same person and as such, the plaintiff could not elect as to which case to proceed with. Further, if the plaintiff's present suit were to be struck out, the court may not order that the plaintiff be at liberty to file another case after the disposal of the other suit because it will prejudice the plaintiff since the issue of limitation has been raised.

[2] The deposition made by the defendant in his affidavit in respect of the other suit was actually an admission by him and thus, pursuant to ss. 17 and 18 of the Evidence Act 1950, the plaintiff is entitled to rely on it as the basis of the present suit.

[3] It has been clearly stated by the Federal Court in *Tio Chee Hing v. Government of Sabah* that a claim may be struck out on the ground that it is time-barred. In the instant case, the plaintiff's claim is time-barred under item 43 of the schedule to the Limitation Ordinance (Cap. 49 of Sarawak) and the acknowledgment made by the defendant's solicitor could not revive the plaintiff's claim as it did not comply with the requirement of s. 19 of the Limitation Ordinance that it must be made before the expiration of the limitation period prescribed.

[Plaintiff's claim struck off.]

Case(s) referred to:
Arab-Malaysian Credit Berhad v. Tan Seang Meng [1995] 1 CLJ 773 ***(refd)***
Lai Kim Loi v. Dato Lai Fook Kim & Anor [1989] 2 MLJ 290 ***(dist)***

Ng Yik Seng & Anor v. Perwira Habib Bank Malaysia Bhd [1980] 2 MLJ 83 ***(refd)***
Riddick v. Thomas Board Mills [1614] QB 881 ***(dist)***
Tio Chee Hing v. Government of Sabah [1981] 1 MLJ 207 ***(refd)***
Yeo Chu Hui v. Lim Cheng Jin & Anor [1993] 3 CLJ 432 ***(refd)***

Legislation referred to:
Companies Act 1965, s. 181
Evidence Act 1950, ss. 17, 18
Limitation Ordinance (Cap 49 of Sarawak), s. 19, items 43 & 93 of schedule
Rules of the High Court 1980, O. 18 r. 19

Other source(s) referred to:
Phipson On Evidence, 14th Edn, p 624
The Law of Evidence, Ratanlal and Dhirajlal, 1987, 17th, Edn

For the plaintiff - Lim Heng Choo (Fabian AH Lim with him); M/s Lim & Lim
For the defendant - Bong Ah Loi; M/s Bong & Co

Reported by Izzaty Izzuddin

JUDGMENT

Hasan Lah JC:

This is an application by the defendant under O. 18 r. 19 of Rules of the High Court for an order that the plaintiff's action be dismissed. This application is supported by the affidavit of Tan Sri Datuk Paduka (Dr) Ting Pek Khiing affirmed on 5 December 1998. The plaintiff is opposing the defendant's application and he has filed an affidavit in opposition which was affirmed on 6 January 1999.

In this action the plaintiff is claiming for the refund and return of the sum of RM8,500,000 from the defendant and interest on the amount from 12 December 1995 and costs. The plaintiff claims that the said amount was paid to the defendant by him between 4 August 1991 and 23 September 1991 in reliance of the promise and representation given by the defendant that the defendant could procure to appoint the plaintiff as the main logging contractor for a timber concession area for a fee of RM8,500,000 and the defendant's promise and undertaking to refund the amount in the event that the defendant failed or was unable to do so. The plaintiff states that the defendant informed him subsequently that the defendant was unable to carry out his promise and representation. Therefore by a letter dated 6 December 1995 the plaintiff formally requested the defendant to refund and return the said amount of RM8,500,000 but the defendant failed and refused to do so.

In his submission the learned counsel for the defendant raised three main issues which are as follows:

(1) Multiplicity of actions;

(2) Privilege Documents; and

(3) Action is barred by the Sarawak Limitation Ordinance.

Multiplicity Of Actions

It was submitted by the learned counsel for the defendant that there is multiplicity of actions made by the plaintiff as the subject matter in the present suit is also the very same subject matter in another proceeding known as suit No. 22-18-96 (MR) and as such the plaintiff's action should be dismissed because it is an abuse of the process of the court. In support of that the learned counsel cited the cases of *Lai Kim Loi v. Dato Lai Fook Kim & Anor* [1989] 2 MLJ 290 and *Ng Yik Seng & Anor v. Perwira Habib Bank Malaysia Bhd* [1980] 2 MLJ 83.

The learned counsel for the plaintiff on the other hand submitted that there is no multiplicity of suits as the plaintiff in Suit No. 22-18-96 (MR) is a different party.

The cases of *Lai Kim Loi v. Dato Lai Fook Kim & Anor (Supra)* and *Ng Yik Seng & Anor v. Perwira Habib Bank Malaysia Bhd (supra)* clearly show that the court is given the discretion to strike out cases on the ground of duplication of issues and relief sought. However that discretion must be exercised correctly so as it will not produce manifest injustice to the parties. In order to do that the court must give due consideration to the peculiar facts of each case. In the present case the plaintiff has stated in his affidavit that he is claiming for judgment for RM8,500,000 in his personal capacity whereas in Suit No. 22 18-96 (MR) the plaintiff is Interhill Enterprise Sdn. Bhd, a separate legal entity. In Suit No. 22-18-96 (MR) the defendant had taken the stand that the said sum of RM8,500,000 was advanced by the plaintiff personally and not by the said Interhill Enterprise Sdn. Bhd. As such the plaintiff has to bring this action personally so that this court can finally and effectually resolve the matter in issue as to who is entitled to claim the said sum so that justice is done. Since this claim is filed against the defendant as a result of the admission made by the defendant that the money was advanced by the plaintiff personally I do not think the plaintiff, by filing this action, has abused the process of the court. It is to be noted that in *Lai Kim Loi's* case it was the same person who presented the petition for the winding-up of the second respondent company and who filed a writ of summons and statement of claim against the first respondent. Under the circumstances the petitioner was supposed to make his election as to which case he had to proceed with. As he had not made his election the court in that case had struck out the petition on the ground that the petition was vexatious and an abuse of the process of the court. That

decision was affirmed by the Supreme Court but at the same time the Supreme Court made a further order that the petitioner be at liberty to file a proper petition under s. 181 of the Companies Act 1965 after the disposal of the suit.

However the plaintiff in the present case and the plaintiff in Suit No. 22-18-96 is not the same person. Even though the plaintiff himself is the managing director and the main shareholder of Interhill Enterprise Sdn. Bhd. who is the plaintiff in Suit No. 22-18-96 but in law their entities are different. As such the question of the plaintiff making election does not arise in the present case. Furthermore the plaintiff's cause of action in the present case is also based upon the admission made by the defendant in his affidavit on 3 December 1996 after Suit No. 22-18-96 (MR) was filed by Interhill Enterprise Sdn. Bhd. that the amount was advanced by the plaintiff personally and not his company, Interhill Enterprise Sdn. Bhd. In addition I have to take into consideration that if I were to order that the plaintiff's action be struck out I will not be able to make a similar order given by the Supreme Court in *Lai Kim Loi's* case that the plaintiff be at liberty to file another case after the disposal of Suit No. 22-18-96 (MR), if necessary, because it will prejudice the plaintiff since the issue of limitation has been raised. In this connection I am reminded of what was said by Gopal Sri Ram, JCA in *Arab-Malaysian Credit Berhad v. Tan Seang Meng* [1995] 1 CLJ 773; [1995] AMR 747, at p. 757 that:

> Further, in a recent and yet unreported judgment of this court, references has been made to the important principle that a rule of court should not be construed so as to produce unfairness or a manifest injustice. (See *Sim Seoh Beng & Anor v. Koperasi Tunas Muda etc.*, [1995] 1 AMR 10:501). Surely, this principle may be invoked to overcome any technical obstacles in the way of achieving substantial justice in a case where a pedantic approach to rule of court will result in injustice.

In the circumstances even though the issues raised and reliefs sought in both actions are almost similar I hold that for the reasons given above the court should not exercise its discretion to strike out the present action on the ground that it is an abuse of the process of the court.

Privilege Documents

It was submitted by the learned counsel for the defendant that the plaintiff is not entitled to rely on the documents obtained from Suit No. 22-18-96 as the basis in the present suit. In support of that the counsel cited the English case of *Riddick v. Thomas Board Mills* [1614] QB 881. It was further submitted that the use of those documents would be contrary to public policy and is an abuse of the court proceedings and as such the plaintiff's action should be struck out.

In para. 8.2 of the statement of claim the plaintiff stated that the defendant has stated in his affidavit which was affirmed on 3 December 1996 in respect of Suit No. 22-18-96 as follows:

> 4(a) I reaffirmed that the RM8.5 millions was advanced by Hii himself in Singapore and Malaysian currency and not by the Plaintiff as alleged.

In para. 4.4 of the plaintiff's affidavit in opposition which was affirmed by the plaintiff on 6 January 1999 the plaintiff stated that due to the said allegation made by the defendant in that affidavit this suit had to be brought by himself so that this court can finally and effectually resolve the matter in issue as to who is entitled to claim the said sum so that justice is done.

It is my view that *Riddick's* case *(supra)* can be easily distinguished from the facts in the present case and the observation made by Lord Denning MR in that case as reproduced by the learned counsel for the defendant in his submission must be restricted only to the documents obtained by way of discovery in the course of the action. At p. 896 of that case Lord Denning MR had this to say at para. E to G:

> In order to encourage openness and fairness, the public interest requires that documents disclosed on discovery are not to be made use of except for the purpose of the action in which they are disclosed. They are not to be made a ground for comments in the newspapers, nor for bringing a libel action, or for any other alien purpose. The principle was stated in a work of the highest authority 93 years ago by Bray J., Bray on Discovery, 1st ed. (1885), p. 238:
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> > A party who has obtained access to his adversary's documents under an order for production has no right to make their contents public or communicate them to any stranger to the suit: nor to use them or copies of them for any collateral object ... If necessary an undertaking to that effect will be made a condition of granting an order ...
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> Since that time such an undertaking has always been implied, as Jenkins J said in *Alterskye v. Scott* [1948] 1 All ER 469, 471. A party who seeks discovery of documents gets it on condition that he will make use of them only for the purposes of that action, and no other purpose.

In addition, what was stated by the defendant in para. 4(a) of his affidavit dated 3 December 1996 was actually an admission by him. The learned authors in *The Law of Evidence* by Ratanlal and Dhirajlal, 17th Edn, 1987 made the following comments relating to s. 17 of the Evidence Act at p. 53:

> Admissions may be oral or contained in documents, *eg*, letter, depositions, affidavits, plaints, written statements, deeds, receipts, horoscopes. Admissions in pleadings are judicial admissions. They can be made the foundation of rights.

And at p. 54 the following comment was made:

> The general rule is that admissions are admissible against the party making them and not against any other party.

In respect of s. 18 of the Evidence Act the following comment was made at p. 55:

> A statement made by a party in a former suit between the same or different parties is admissible.

In *Phipson On Evidence*, 14th Edn, it is stated at p. 624 that:

> When a party sues, or is sued, personally, any admission made by him on a former occasion, even while a minor, or sustaining a representative character, may be given in evidence against him; but when sued or suing as a representative, his principal cannot be prejudiced by his admissions made before sustaining, or after he has ceased to sustain that character.

For the reasons given above I am unable to agree with the defendant that the plaintiff is not entitled to rely on the defendant's affidavit filed in Suit No. 22-18-96 as the basis in the present suit.

The Action Is Barred By The Sarawak Limitation Ordinance

In this connection it was submitted by the learned counsel for the defendant that the plaintiff's action is time-barred by item 43 of the schedule to the Limitation Ordinance (Cap. 49 of Sarawak) as the plaintiff's claim did not accrue within three years from the date of commencement of this action. According to the counsel the three years period began to run from the date the money was received by the defendant which was sometime between 4 August 1991 and 23 September 1991.

The learned counsel for the plaintiff on the other hand submitted that limitation can never be a reason to strike out a claim and in support of that he cited the case of *Yeo Chu Hui v. Lim Cheng Jin & Anor* [1993] 3 CLJ 432. The learned counsel further submitted that the question of limitation is a triable issue as it relates to the issue of acknowledgement of debt under s. 19 of the said Ordinance. In reply to that the learned counsel for the defendant submitted that the Federal Court case of *Tio Chee Hing v. Government of Sabah* [1981] MLJ 207 has stated clearly that a claim may be struck out on the ground that it is time-barred. As regards the acknowledgement made by the defendant's solicitor on 22 December 1995 the counsel for the defendant submitted that under s. 19 of the Ordinance it did not revive the action because the acknowledgement was made after the expiry of the period prescribed for the suit.

As to the issue whether limitation can be a reason to strike out a claim I think the position is clearly stated in *Tio Chee Hing's* case and as such there is no merit in the submission made by the counsel for the plaintiff that the defendant cannot apply to strike out the claim on ground of limitation. As such the only issue needs to be decided upon here is whether the question of limitation is a triable issue. If the defendant's contention that the claim falls under item 43 of the Schedule to the Sarawak Limitation Ordinance is right then I think this is a plain and obvious case that the plaintiff's action is time-barred. This is because the alleged acknowledgement which was made by the defendant's solicitors on 22 December 1995 cannot revive the limitation under item 43 as it was made after the plaintiff's claim was time-barred which according to the defendant must be made before 23 September 1994.

In para. 5 of his reply the plaintiff avers that the limitation period commenced from the date of acknowledgement of the receipts of the amount made on 22 December 1995 and the three year's period expires on 21 December 1998. In other words the plaintiff agrees that the period of limitation is three years but alleges that it commenced on 22 December 1995. However the plaintiff does not say clearly or specifically under which item of the schedule to the Limitation Ordinance his claim falls. At para. 8 of the plaintiff's affidavit in opposition the plaintiff states that:

> There is no fixed duration for the defendant to perform the said oral agreement but after a lapse of 3 years from 4.8.1991 and 23.9.1994 (*ie*, August/ September, 1994) the Defendant informed me that he was unable to secure my appointment as the main logging contractor for the proposed concession areas as pleaded in paragraph 6 of the Statement of Claim and requested more time to carry out his promise and representation. After a lapse of another year *ie*, 1995, I made enquiry concerning the said appointment with the defendant and he informed me that he was unable to fulfill or carry out his promise and representation. On 6.12.1995, I used Interhill Enterprise Sdn. Bhd.'s letterhead to formally request the refund and return of RM8,500,000.00 from the defendant.

If I understand the plaintiff correctly I think the plaintiff is also saying that his claim falls under item 43 of the schedule. I also think that his claim cannot fall under item 93 of the said schedule as item 93 concerns with the claim for compensation only.

Under such circumstances I am of the view that the plaintiff's claim is time-barred under item 43 of the schedule and I agree with the learned counsel for the defendant that the acknowledgement made by the defendant's solicitor on 22 December 1995 could not revive the plaintiff's claim as it did not comply with the requirement of s. 19 of the Limitation Ordinance that it must

a be made before the expiration of the period prescribed for the suit. As such and relying on the Federal Court's decision in *Tio Chee Hing's* case I allow the defendant's application on the ground that the plaintiff's claim is time-barred and accordingly I order that the plaintiff's action be struck out with costs to be taxed unless agreed upon.

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